

Judicial Council of California Hearing
Improving the Management and Oversight of Probate
Conservatorship Cases in California Trial Courts

March 24, 2006

Comments submitted by:

Patricia L. McGinnis, Executive Director
California Advocates for Nursing Home Reform

Your Honors, members of the Task Force, I thank you for this opportunity to address our concerns regarding the current state of probate conservatorships in California and to present some ideas for improving the system.

We had asked a number of consumers to address this Task Force. Unfortunately, all of the consumers I talked to were afraid to testify. They were either fearful of being caught up in the system again or fearful of being sued. I hope that the work of this Task Force will result in making the probate conservatorship system the impartial and accessible system it is supposed to be.

Over the past twenty years, CANHR has been working on various issues that affect elderly and disabled consumers, particularly as they relate to long-term care. We have seen a sharp increase in problems with probate conservatorships over the years and these problems are generally the most difficult to address.

Because of the increase in calls regarding conservatorships, during the summer of 2005, our office undertook a study of several years of probate conservatorships in an effort to find basic statistics, identify problems and formulate solutions. Although the study is still in progress, here is just one example of what we found:

In December 2001, 91-year-old San Francisco woman was temporarily conserved by a professional conservator. After a referral from a hospital social worker, the private

conservator - unknown to the elder - petitioned the San Francisco Probate Court for conservatorship, asserting that the client was unable to properly provide for her personal needs for physical health, food, clothing, or shelter and that she was substantially unable to manage her financial resources or resist fraud or undue influence. After several months, the client was fortunate enough to find a private attorney who agreed to represent her pro bono and was, it turned out, capable enough to convince the San Francisco Probate Judge that she could take care of herself and her property. In November 2002, the judge ordered the conservatorship removed. Prior to the conservatorship, she had \$74,378.98 in cash and owned a San Francisco duplex free and clear of any mortgage or liens. As a result of the fees incurred by the conservatorship and the costs of remodeling ordered by the conservator, her cash was reduced to less than \$2,000 and liens totaling \$31,821.13, accruing interest at 5% per annum, were sought against her property.

Many similar stories were highlighted in the Los Angeles Times series. Conservatorships are meant to protect adults who can no longer handle their personal and/or financial affairs. Many in the geriatric care, healthcare, and legal fields argue that the majority of conservatorships provide necessary care and attention to elders who would otherwise suffer from neglect or abuse. Many also argue that these cases are exceptions within a benevolent institution. Frankly, it doesn't matter if it only happens to one person - it should be an unacceptable.

Simply increasing the standards or training for private conservators or court personnel would be window dressing. We need to ensure that conservatees are protected from inappropriate conservatorships in the first place and that their estates are protected from fraud and abuse; that they can contest the conservatorships, the accountings or the court-appointed conservator; that, in the absence of abuse, their families are given first opportunity to be the conservator; and that they can more easily seek and obtain restitution when they have been wronged.

We respectfully submit the following proposals for reform:

Make It More Difficult to Obtain Private Conservatorships

In any just society, it would be extremely difficult for a complete stranger to obtain absolute control over another person. To give a complete stranger control over your life and your property; to give them the power to decide where you're going to live; who can visit you; what medical treatment you will receive; how much of your own money you can spend and on what; whether your house will be sold - this should be a very thoughtful and probative process. Unfortunately, for the past ten years at least, the state of California and a desperately overworked probate system has made it easier and easier for private conservators to take over the lives of elders.

Other states recognize the importance of protecting the constitutional rights of vulnerable elders. Many states require findings of exact degrees of incapacity or incompetence so as to impose only the necessary degree of guardianship or conservatorship. In California, we have taken an all or nothing approach - imposing conservatorships over the person and the estate, when a less restrictive alternative would do.

Far too often, an elderly person suffers from the effects of malnutrition, of new medications, of a fall, etc., and is only temporarily incapacitated. With the appropriate treatment or therapies, the elder can live and maintain independently within a few months. Unfortunately, our current system provides only for an annual review and biennially thereafter. The procedures should provide for at least a six months review after the conservatorship is approved.

We have also seen an unacceptable increase in the use of temporary conservatorships. While a temporary conservatorship may be viewed as a procedure restricted to emergency situations in one county, it is too often a procedural first step to permanent conservatorships in another. The law should be amended to more strictly limit temporary conservatorships and to encourage consistency among all counties. The five-day notice for a temporary conservatorship is insufficient. The duty of the court investigator to

interview the conservatee should never be waived, nor should the notice to the conservatee.

Less Restrictive Alternatives: Some of the counties interviewed in our study indicated that they had very few conservatorships, as they preferred to set up a representative payee or money management system. Although the current system requires conservators to state in the petition why alternatives are not available, it does not require them to prove the lack of less restrictive alternatives, such as money management, home care, etc. This would make the judge's decision that there is no alternative an appealable finding. Unless and until a less restrictive means test is incorporated into the Probate Code (perhaps into §1801), conservatorships will continue to be used in many counties as an easy *first* alternative, rather than what is in the best interests of the consumer.

Family Reunification: In far too many cases, private conservators are appointed over family members to control the lives and estates of elders. Family members are often demonized by the professionals involved and prevented from contact with their parents or grandparents because of innocent or uninformed mistakes they may have made in handling the affairs of their elders. The result is that conserved elders are often isolated from their families, placed in locked facilities or nursing homes when less restrictive alternatives are available. Some measures should be added to ensure that private conservators are appointed as a *last* alternative over qualified, willing family members. There should be some burden to show that a willing family member is unqualified or otherwise unable to serve.

Another approach to this serious flaw is embodied in the juvenile dependency law: Welfare and Institutions Code section 300 et seq. In this area of law, problems such as drug abuse or domestic violence arise within families, which often result in the placement of minors into foster homes. The underlying mandate of this law, however, is to reunify a minor with his or her family. The Department of Health Services is charged with developing a plan of reunification. That plan is monitored and directed by the court.

Children are often reunited with their families when the underlying problems have been resolved.

We suggest that the feasibility of incorporating family unification into the probate conservatorship proceedings be explored.

Notice and Opportunity to Appear: In many cases, the conservatee is not provided proper notice or an adequate opportunity to appear at the hearing. In Solano County, for example, the Public Guardian's office refused to give notice in any of the 80 temporary conservatorship applications filed in 2000. They routinely filed for, and were granted, waivers. Our research has shown that even providing a proposed conservatee notice of a hearing does not mean that they will be given the necessary assistance to attend the hearing. In the case mentioned, for example, the facility refused to arrange for transportation for the client. Had she attended the hearing and had the opportunity to testify in front of the judge, the temporary conservatorship would most likely not have been approved.

Challenging Conservatorships: It is difficult, and often next to impossible, for a conservatee to contest a conservatorship. The law should be amended to give conservatees immediate access to their funds to pay for legal challenges to their conservatorship, the accountings and/or the conservator, if they wish. Once conserved, it is difficult at best, for a person to hire an attorney to appeal a conservatorship, to challenge the accuracy of accountings or to challenge the conservator who was appointed. Conversely, professional conservators should not be permitted to use a conservatee's funds to fight such challenges, particularly when their opposition to a challenge by a conservatee is unsuccessful. This is a perverse use of the conservatee's funds and should not be permitted.

Accountings: Conservators should be sanctioned and fined when accountings are not filed in a timely manner and all accountings should be subject to review and verification, including submission of receipts and invoices for all alleged expenditures.

State and County Data Base: Our research has also shown that few counties keep track of probate conservatorship information. Most couldn't even tell you the number of such conservatorships filed or approved in any given year. Although the Welfare and Institutions Code § 5402(a) requires the Department of Mental Health to collect and publish annually quantitative information on the number of LPS conservatorships, including the number of persons for whom LPS conservatorships are established in each county, no such requirement exists for reporting and tracking probate conservatorships.

We need a state and county reporting system that provides information on all of the key procedural benchmarks. We need to track the name of the conservator; the number of emergency appointments approved annually; the number granted without notice to the conservatees; or before an attorney is appointed; or before the court investigator's report is filed; the number of proposed conservatees who appeared at the initial hearing; the number of conservatorships opposed; the annual accountings and the dates filed. Without this basic information, we have no way to track abuses in the system or to address the problems inherent in the system.

AB 1363 (Jones), for example, requires some of this information to be collected by the Judicial Council and requires the Judicial Council to submit an annual report to the Legislature. We recommend that the Judicial Council to post this report to its website at the same time it is submitted to the Legislature.

Restitution: Current law has no provisions for a person to obtain restitution when the conservator has plundered the estate or when someone has been wrongfully conserved. Language should be added to the Probate Code to address this omission.

Written Statement of Rights: A bill of rights for conservatees should be mandated to be provided to every potential conservatee by the Court Investigator, explaining the process, what it means, what rights the conservatee will have to challenge the conservatorship, etc. In case after case, elderly conservatees have noted that they had no

idea what a conservatorship actually meant in terms of loss of their rights and control of their property.

It is ironic that a system that was designed to protect elders is now enabling exploitation and neglect. When systems that are supposed to help people don't work, it's time to reevaluate these systems. In this case, we have to ask: are we really protecting elders from abuse and neglect; are we really protecting their estates, by turning over control of their lives to strangers who profit from their vulnerability?

PATRICIA L. MCGINNIS

BIOGRAPHICAL INFORMATION

Patricia McGinnis founded Bay Area Advocates for Nursing Home Reform in 1983 as a non-profit community-based organization and has been Executive Director since its inception. Now titled California Advocates for Nursing Home Reform, "CANHR" serves consumers, legal services staff, advocates, and health care professionals throughout California with pre-placement counseling, consumer information, a State Bar certified Lawyer Referral Service, pension counseling, legislative advocacy, technical assistance, advocacy support and information and referral services.

Ms. McGinnis received her J.D. in 1977 from Golden Gate University Law School, and has been involved with long term care reform for over 30 years. Under contracts with the California Department of Aging from 1979 through 1984, Ms. McGinnis developed curriculum and provided training to all of California's sub-state long-term care ombudsman programs. She has written and lectured extensively on issues such as long term care placement, financial planning, elder abuse, residents' rights, family councils and the use of restraints in nursing homes. Ms. McGinnis is an adjunct lecturer at San Francisco State University's Gerontology Program.

Ms. McGinnis and California Advocates for Nursing Home Reform have received numerous awards and recognition for their nursing home advocacy work over the years including the California Works! Award in 1988, the first annual America's Award by the America's Award Foundation in 1990, the National Citizens Coalition for Nursing Home Reform's Advocacy Award in 1998, the National Senior Citizens Law Center Advocacy Award in 1999, the San Francisco Senior Centers' annual Senior Advocate Award in 2001 and the Little Brothers-Friends of the Elderly 2001 National Armand Marquiset award.